82-1400

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO. _____

WOODROW YOKUM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

RICHARD W. CARDOT
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Counsel for Petitioner

QUESTION PRESENTED

May the Respondent Government be entitled to dismissal, of Petitioners motion to show cause why property seized from Petitioner under search warrants in 1967 has not been returned, based on statute of limitations when Petitioner has almost continually from 1967 to present attempted to litigate the issue of the return of property seized is no longer needed in any further criminal proceedings.

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PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

Petitioner Woodrow Yokum, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the U. S. Court of Appeals for the Fourth Circuit in this proceeding.

An Order was entered in the U. S. Court of Appeals for the Fourth Circuit on the 22nd day of December 1982, when Petition for rehearing was denied.

QUESTION PRESENTED

May the Respondent Government be

entitled to dismissal, of Petitioners motion to show cause why property seized from petitioner under search warrants in 1967 has not been returned, based on statute of limitations when petitioner has almost continually from 1967 to present attempted to litigate the issue of the return of property seized is no longer needed in any further criminal proceedings.

STATEMENT OF CASE

During the months of February and March, 1967, pursuant to a series of search warrants issued by the United States District Court for the Northern District of West Virginia, the Respondent seized and impounded a large quantity of personal property which is the subject matter of this suit. The property consisted of automobiles, trailers, trucks, electronic and radio equipment, and other similiar property.

The search warrants alleged that the "property was embezzled, stolen, purloined and converted from the said United States

of America and then concealed and retained with intent to convert said (property) for personal use and gain, in violation of Title 18, Section 641, United States Code".

Following the seizure of the property in issue, two separate federal actions were instituted against Petitioner. The first, commenced in the Northern District of West Virginia, Civil Action 67-91-E, resulted in Petitioner's conviction on Six (6) counts of violating 18 U.S.C. Sec. 2312 (Interstate Transportation of Stolen Property in Interstate Commerce), and Three (3) counts of violating 18 U.S.C. Sec. 641 (Theft of Government Property). However, none of the property which is the subject of this claim was used in that or any other criminal action. The Judgment and Commitment Order was entered on August 5, 1968. On appeal, the Fourth Circuit reversed the District Court as to One (1) count but affirmed Petitioner's conviction as to the remaining counts.

The second criminal proceeding, commenced by indictment in the Eastern

District of Virginia, was dismissed against Petitioner on July 9, 1970. Again none of the property which is the subject of this claim was used in that or any other criminal action.

Petitioner prior to, during and subsequent to Criminal Action No. 67-91-E in the United States District Court for the Northern District of West Virginia, moved for the return of the property. The Respondent resisted motion and advised the United States District Court that all property was being "retained for use as evidence in further investigation and proceedings involving surplus property matters in other jurisdictions and that the Government was retaining the property to be used as evidence". On April 13, 1970, the Petitioner, Woodrow Yokum, by counsel, filed a Motion renewing his earlier Motions for return of the property. That Motion was dismissed by the United States District Court for the Northern District of West Virginia on May 29, 1970.

Petitioner next filed a complaint on July 12, 1973, seeking return of the property or the reasonable value of the property. The district court dismissed that complaint on the basis of sovereign immunity as to the United States, and quasi-judicial immunity as to defendant James Companion, the United States Attorney and the amount in controversy exceeded Ten Thousand Dollars ($10,000.). Yokum v. United States, et al, C.A.No. 73-105-E (N.D.W.Va. Sept. 13, 1974).

Subsequently, on January 2, 1975, Petitioner filed a claim in the United States Court of Claims seeking compensation for the property seized. In his petition, it was stated he was entitled to the return of all the property taken (Count I), or $400,000, the reasonable value of that property. Yokum v. United States, No. 2-75 (Ct.Cl. 1975). The petition was denied, and the Court of Claims granted summary judgment for the United States on the basis that the damage claim was barred as a matter of law by the

statute of limitations (App. 52). The Court of Claims denied Petitioner's motion for rehearing and the Supreme Court denied certiorari. Yokum v. United States, 208 Ct. Cl. 972, 529 F.2d 532 (1975), cert. denied, 429 U.S. 820 (1976). The issue on the return of property was not litigated.

Following the action instituted in 1975 in the U. S. Court of Claims (Yokum v. U.S. No. 2-75, 208 Ct Clms 972, 529 F 2d 532) which was dismissed and cert denied barring Yokum by the statute of limitations. The Government instituted an action in the U. S. District Court for the Northern District designated as United States of America v. Woodrow Yokum, Civil Action No. 76-241-E. This was a show cause action by the Government to remove a portion of the subject personal property from Petitioner's real estate. When the Court indicated it would require the Government to establish its ownership in the property, the matter was dismissed on the Governments motion on March 22, 1979 some two (2) years and 150 days after it was instituted.

Petitioner next filed a petition in district court on July 6, 1979, requesting

that the United States be ordered to show cause why it should not be ordered to return to petitioner all the property that has been seized. On February 20, 1981, the District Court for the Northern District of West Virginia dismissed the petition with prejudice on the grounds that the suit is barred by res judicata. Yokum v. United States, C.A. No. 79-0130-E(H) (N.D.W.Va. Feb. 20, 1981).

Petitioner appealed from the U. S. District Court for the Northern District of West Virginia. The Fourth Circuit Court of Appeals in its opinion set aside the issue of res judicata and raised the issue of the statute of limitations thereby barring further adjudication by Petitioner. The defense of statute of limitations was not raised in Respondents motion to dismiss in District Court. The Fourth Circuits answer was that the government cannot be held to have waived this defense. Therefore, the Court applied it and affirmed the judgment of the District Court on other grounds. Yokum v. U. S.. U. S. Court of Appeals for the Fourth Circuit, No. 81-1299.

ARGUMENT

April 13, 1970 motion was made in criminal action United States v. Yokum, No. 67-91-E in the U. S. District Court for the Northern District of West Virginia, for the return of property seized by the Respondent, United States of America. The Honorable Robert Maxwell, Judge, could have and Petitioner believes should have then determined this issue. An order then would save further expense to Petitioner and Respondent and expedite the matter of the return of the property. Judge Maxwell declined to do so requiring the Petitioner to bring a separate civil action. On May 29, 1970 Judge Maxwell issued the order below.

> "Ordered that the Court ruling on the defendants motion for the return of property and for the rental of property seized, for reasons appearing on the record, is made without prejudice to the defendants right to prosecute a civil action for the return of the property and for the rental of the property seized."

Petitioner argues before this Court the issue of the return of the property

has not been addressed by this or any other Court. It is the duty of the Respondent United States of America, after the need or use of seized property pursuant to search warrant, to either establish the seized property as contraband, fruits of the crime subject to forfeiture or confiscation or return to the owners of the property if that can be established or the parties from whom they were taken. There can be no dispute this has not been done.

It is rather interesting to review United States of Americas brief on the statute of limitations concerning Petitioners lack of diligence and the government being prejudiced, "the longer the delay, the less the need to search for specific indices of prejudice" Grisham v. United States, 392 F.2d 980, 983 (Ct.Cl.), cert. denied 393 U.S. 843 (1968). There is no question delays make the prosecution as well as the defense of an action difficult however we would submit any delays have not been as a result of the Petitioners lack of diligence to attempt

to prosecute this matter. The Respondents further statement "...an Appellant has offered no legitimate excuse for the delay, particularly the period between Appellants last suit in the Court of Claims in 1975 and the suit in the District Court", is an utter misrepresentation of the facts. Petitioner attempted to litigate return of property in response to Governments motion to show cause to remove the property from Petitioners own real estate. When challenged by Petitioner to prove Governments ownership vis-a-vis search warrants the government voluntarily dismissed the action U. S. v. Yokum, C.A. No. 76-241-E.

Three (3) years and seventy three (73) days later on July 12, 1973 the Petitioner instituted an action in the U. S. District Court for the Northern District of West Virginia, Yokum v. United States, et al, 73-105-E. The Court, on September 13, 1974, some approximately 429 days after it was filed, dismissed the suit. On January 2, 1975, 110 days after the dismissal of the action in the U. S.

District Court Petitioner instituted a suit in the U. S. Court of Claims denoted, Yokum v. United States, No. 2-75. Some approximately two (2) years and twenty two (22) days elapsed while this matter in the Court of Claims and its appeal was prosecuted. Eighteen (18) days after certiorari was denied by the Supreme Court of the Court of Claims decision, Respondent instituted suit in the U. S. District Court for the Northern District of West Virginia in Civil Action 76-241-E. This matter was dismissed upon motion of the Respondent on March 22, 1979 some two (2) years and one hundred fifty (150) days after it was instituted by the Respondent. On July 6, 1979 some one hundred six (106) days after the show cause proceeding had been dismissed by Respondent the Petitioner inititated this proceeding in the U. S. District Court for the Northern District of West Virginia denoted as Woodrow Yokum v. United States, Civil Action 79-130-E(H). This action was dismissed by the Honorable Charles E. Haden on February 22, 1981.

The Fourth Circuit ruled the six (6) year statute of limitations prevails pursuant to 28 USC Sec. 2401. The question is if the six (6) years began to run with May 29, 1970, was this six (6) year statute of limitation period tolled pending Petitioners attempt to litigate the return of the property? Three (3) years and seventy three (73) days would have elapsed from May 29, 1970 until the Petitioner instituted his first action towards the return of the property on July 12, 1973. During the pendency of that suit or until September 13, 1974, a period of four hundred twenty nine (429) days or one (1) year and sixty four (64) days of the six (6) years of statute of limitations was tolled during the period of litigation.

This Court should find the suit instituted by Petitioner, Yokum v. United States, 2-75 (Ct. Clms) in the Court of Claims some one hundred ten (110) days after the dismissal of the action by the U. S. District Court, the statute of limitations was again tolled from January

2, 1975 for some period of two (2) years and twenty two (22) days until October 4, 1976. This would mean up to that particular period of time only, i.e. from May 29, 1970 to October 4, 1976, only three (3) years, one hundred eighty three (183) days of the six (6) year statute of limitations had expired.

Within 18 days of certiorari being denied the matter of the subject property was again brought before a Federal Court when the Respondent initiated its show cause order on October 22, 1976 in the U. S. District Court for the Northern District of West Virginia. This litigation again tolled the statute of limitations because the issue of return of the property was again in the breast of the Court when Petitioner replied to Respondents Show Cause Petition requesting return of the property. This action tolled for an additional two (2) years one hundred fifty (150) days or until March 22, 1979 when upon Respondents own motion the matter was dismissed.

Some one hundred six (106) days later or on July 6, 1979 the present show cause action was instituted by the Petitioner. Therefore since the last motion for the return of the property was ruled on in the criminal action 67-91-E on May 29, 1970, to the present only three (3) years three hundred seven (307) days of the statute of limitations has expired. The balance of the statute of limitation in time having been tolled while the issue of the return of property was in litigation in a court which would have jurisdiction over the subject matter.

It is well established the Courts of the United States have a duty to oversee the operation of the United States Government and it agencies, with oversight the Government does not abuse the powers of the search warrant and the processees through which the Courts permit the government to operate. The U. S. District Court for the Northern District of West Virginia in criminal action 67-91-E had an opportunity to resolve these matters in

May 1970 and with regret, expense and delay, unfortunately refused to do so.

The Federal Courts have been granted supervisory powers to resolve issues of abuse by government. Slocum v. Mayberry, 2 wheat. 1,9, 4 L ed 169 (1817), in re Behrens, 39 F.2d 561 (2d Cir. 1930). The Respondent had failed to institute any forfeiture or confiscation proceedings after the original criminal action 67-91-E had ended, as required in United States v. Wilson, 176 U.S. App. D.C. 321, 540 F.2d 1100 (1976) at 1103-04. This Court, as stated in Rule 17(a) of the Rules of the U. S. Supreme Court has the power of oversight as the Courts below, have a duty to see that the powers granted to the Respondent are not misued.

There can be no excuse by the Respondent for it failure to initiate a timely action for forfeiture and confiscation of the seized property after it was no longer required in any prosecution or lead to further prosecution. Not to do so as pointed out before reflects an abuse of process on the

part of the United States of America. This Court, as the Courts below, has the power to supervise the actions of United States of America to see the United States of America is required to do that which it is required, obligated and should do. Slocum v. Mayberry, supra, in re Behrens, supra.

Federal Courts have the general equitable power to oversee and order the return of property seized although no criminal action is pending. Richey v. Smith, 515 F.2d 1239, 1242-3 5th Circuit 1975 (cited with authority) and Hill v. McMartin, 432 F.Supp 99(1977). And in the case of United States v. Arch A. Moore, Jr., 423 F. Supp 858 (1976) the Court held

> "... the Government's continued retention of Moore's records and possessions is an abuse of prosecutioral power and violative of what is a limited grant of power to force individuals, through legal procedures, to give up control of documents and other objects. It is out of keeping with the function and purpose of the subpoena power as provided by statute and it is at odds with the existing case law."

The Petitioner has with diligence attempted to litigate the matter of the return of the property. It was and is the duty of Respondent to go forward and resolve the return of the property.

As in Slocum v. Mayberry, supra, the Court, in 1817, held

> "...if the seizing officer (in this case appellee) should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure." (Emphasis added)

This is what the Petitioner has been attempting to do almost continuously since 1970.

By Motion and Order in Yokum v. United States, C.A. No. 79-0130-E(H) the U. S. District Court for the Northern District of West Virginia, dated the 4th day of February, 1983, The Honorable Charles H. Haden, II, Judge, found Petitioners response, as asserted, to Respondents Motion for disposition of

property to be frivolous in law at this point in the litigation and issued an order directing the U. S. Marshall to dispose of Petitioners property and account for after disposition. The Courts and government refuses to address the basic question that search warrants don't divest parties interest in property taken from them. Thus how has title been vested in Respondent to now dispose of the same and what is to be done with the proceeds (money) accrued by the Marshalls in disposition of the same?

Petitioners asserted in response to Governments Motion to immediately dispose of the seized property that time was not of the essence since subject property had been stored since 1977. Further Petitioner advised the U. S. District Court he intended to commence this appeal and asked stay until decision is made on this matter. Petitioner avered the subject property has been for in all effect abandoned by Respondent. The Respondent, and the U. S. District Court are in error in now saying "all appellate

action has been concluded..." and the case has now been returned to the jurisdiction of the District Court. Further such Motion for an Order to dispose of the property should not have been granted without oral argument and hearing. Not withstanding Petitioners defense of the tolling of the statute of limitations or arguing in the alternative that if Petitioner is barred by the statute of limitations Respondent is barred on the same grounds.

Therefore, there is nothing in the record to support Respondents are vested with title to and power of disbursement for disposition of the seized property without more.

CONCLUSION

The Courts below have so widely departed from the established principles controlling search warrants and the disposition of seized property in this matter as to warrant this Courts power of supervision. Petitioner has exhausted each and every remedy to effectuate a

hearing on the merits in this matter. Even now with the Court below Order to the Government to dispose of the seized property the Respondents and the Courts below abuse the usual course of judicial proceedings to the detriment of Petitioner. Petitioner prays this Court to stay disposal of the property pending this appeal and reverse the decision of the Courts below and remand with directions to hear Petitioners show cause Petition on what basis the government is vested with ownership in the property.

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Elkins, West Virginia 26241

Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

WOODROW YOKUM,

Petitioner,

vs. CIVIL ACTION NO. 79-0130-E(H)

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

Respondent moves this case be dismissed pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. In this action Petitioner seeks an order for Respondent to show cause why certain property seized from him pursuant to valid search warrants should not be returned. It is Respondent's position that Petitioner is foreclosed from recovery of the property because the issue sought to be determined in this action has been previously adjudicated.

In 1967 Respondent obtained a series of search warrants to seize property allegedly stolen from the United States by the Petitioner. One group of search warrants, executed on February 10, 1967,

resulted in the recovery of a large variety of articles, including a utitlity truck, a dump truck, a 1962 sedan, two large military trailer vans, various items of electronic equipment, hundreds of electric typewriters and other electric office machines, musical instruments, two military assault boats, 967 pairs of unused binoculars, several guns, one pneumatic pavement breaker, numerous rubber burial bags, a closed circuit television system, and may other articles of varied descriptions.[1] An Army Reserve unit made available eight Army trucks and 24 Army personnel on February 12, 1967, to assist in removing and transporting the confiscated property to storage places.[2]

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[1]See Petitioner's Exhibits A, 1 through 9.

[2]See Government's Memorandum filed June 16, 1977, in United States of America v. Woodrow Yokum, Fred L. Riggleman and Sherri L. Riggleman, Civil Action No. 76-0241-E(H), dismissed without prejudice by Order of this Court, filed March 23, 1979.

Another search warrant issued on March 10, 1967, resulted in the seizure of property allegedly stolen from the United States. Some of the property was seized by notice and padlocked in a barn on Petitioner's farm.[3]

Petitioner was convicted on ten counts of an eleven count indictment charging him with interstate transportation of stolen motor vehicles; unlawful sale of property stolen from the United States; and transportation of property obtained by fraud from the United States. His conviction as to one of the ten counts was overturned on appeal. See United States v. Yokum, 417 F.2d 253 (4th Cir. 1969), cert. denied 397 U.S. 907 (1970).

Petitioner sought return of the property seized upon which there was no related conviction or for which there was no forfeiture proceeding instituted by Respondent to effect transfer of title to

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[3]See Petitioners's Exhibits F, 1 through 3. (There may be a dispute as to the location of some of the seized property).

the United States. Petitioner's first attempt to recover the property was in conjunction with a request for a reduction of sentence. In that proceeding a Rule 41(e) motion, Federal Rules of Ciminal Procedure was denied without prejudice to file a civil action to recover the seized property.[4]

Petitioner filed a complaint on July 12, 1973, in the United States District Court for the Northern District of West Virginia seeking either the reasonable value or the return of the seized property. The case was dismissed by

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[4]United States of America v. Woodrow Yokum, 67-91-E (N.D. W. Va., May 29, 1970). Judge Maxwell's written order states in pertinent part:

"ORDERED that the defendant's Motion For Admission to Probation Or For Reduction of Sentence and Motion For Return Of Property and For Rental Of Property Seized be, and the same are hereby, overruled, and it is further

ORDERED that the Court's ruling on the defendant's Motion For The Return of Property and For Rental Of Property Seized, for reason appearing on the record, is made without prejudice to the defendant's right to prosecute a civil action for the Return Of The Property and For Rental Of Property Seized."

Memorandum Order filed September 13, 1974.[5] The dismissal was premised on

[5]Woodrow Yokum v. United States of America and James Companion, etc., C.A. No. 73-105-E (N.D.W.Va.). The Court described the motion it granted as follows:

> "Defendant United States of America has filed a motion to dismiss for lack of jurisdiction over the subject matter, based on the doctrine of sovereign immunity. Defendant Companion has also filed a motion to dismiss for failure to state a claim upon which relief can be granted on the ground of quasi-judicial immunity."

Certainly the action would be res judicata as to Defendant Companion (not a party in the present action), or anyone else under Rule 19(a), Federal Rules of Civil Procedure, who should have been joined in that action. Petitioner clearly had the option of appealing dismissal of his constitutional cliam against Defendant Companion. See Davis V. Passman, 442 U.S. 228, 245 (1979); Butz v. Economou, 438 U.S 478, 504 (1978); and Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 396 (1971). But as to Defendant United States of America (Respondent in the present action), res judicata would not apply. In Hunter v. United States, 283 F. 2d 874 (Ct.Cl. 1960), the Court held that an action dismissed in a district court (because no jurisdiction could be asserted there over the Defendant United States) could properly be brought in the Court of Claims and rejected the contention that the subsequent action was barred by res judicata.

the immunity from suit of the Defendants. No appeal was taken from that dismissal.

On January 2, 1975, Petitioner sought damages under the Fifth Amendment in the United States Court of Claims, but was denied relief because the claim was barred as a matter of law by the statute of limitations.[6] Also on January 2, 1975, an action was filed by Petitioner's daughter and son-in-law, Sherri and Fred Riggleman.[7] This action was decided adversely to the Rigglemans by the United States Court of Claims by order dated September 29, 1977. No appeal was taken.

On October 22, 1976, Respondent petitioned this Court to order Woodrow

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[6]Woodrow Yokum v. United States, 208 Ct.Cl. 972, 529 F.2d 532 (1975), cert. denied, 429 U.S. 820 (1976).

[7]A barn within which much of the seized property had been padlocked was on a farm transferred to Petitioner's daughter, subject ot a life estate retained by Wanda Yokum, by a deed dated December 23, 1968. The life estate was released on April 19, 1973. Fred L. Riggleman, et al v. United States, No. 3-75, Slip Op. at 2 (Ct.Cl., Sept. 29, 1977).

Yokum, Fred and Sherri Riggleman to show cause why they should not be ordered to allow the United States upon the Yokum-Riggleman property to remove the seized property.[8] Respondent withdrew its petition and the action was dismissed.

Respondent seeks to have the present action dimissed on the grounds of res judicata. Petitioner contends that Respondent has never established its title to the property and thus incorrectly assumes that it owns the seized property without having established the same by way of ruling.[9]

The Court in Thomas v. Consolidated Coal Co., et al, 380 F.2d 69, 77(4th Cir.

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[8]United States of America v. Woodrow Yokum, Fred L. Riggleman and Sherri L. Riggleman, Civil Action No. 76-0241-E(H), dismissed without prejudice (N.D. W.Va., March 22, 1979).

[9]Petitioner's memorandum in response to Respondent's motion to dismiss is quite convincing on this point. The memorandum, however, is not convincing on why determination of this issue is not barred by res judicata.

1967) cert. denied 389 U.S. 1004 and 1059 (1967), stated:

> "Res Judicata is a broad, judicially developed doctrine under which the courts have sought to deal with the problems posed by the effects, if any, of a prior judgment on subsequent litigation."

The Court further stated:

> "Embraced within that rule are certain definite requirements which must be met before the rule will bar the subsequent suit. Briefly stated, these are: (1) The former judgment must have been both valid and final; (2) The cause of action asserted in the subsequent litigation must be the same cause of action as was asserted in the former litigation; (3) The former judgment must have been rendered on the merits; and (4) The parties to the former judgment must stand in such relationship to the parties to the subsequent action as to entitle the latter to the benefits and subject them to the burdens of the prior litigation. [480 F.2d, at 79]"

The Court finds that the history of litigation by the present parties fulfills the requirements of Thomas. In Yokum v. United States, 208 Ct. Cl. 972, 529 F.2d 532 (1975), cert. denied, 429 U. S. 820

(1976), all of the Thomas requirements are met as between the parties to the present action. Further, the decision in Woodrow Yokum v. United States of America and James Companion, etc., supra, precludes any cause of action concerning the seized property Petitioner could possibly bring against any other party. Also, any action for rent is precluded by the Fred L. Riggleman, et al v. United States, No. 3-75, Slip Op. at 2 (Ct. Cl., Sept. 29, 1977), action. Thus, Petitioner present action can in no way state a cause of action which cannot now be dismissed on the merits by the doctrine of res judicata.

Accordingly, this Court will grant Respondent's motion to dismiss with prejudice to any further claim as to the seized property which might be made by Petitioner.

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to all counsel of record.

ENTER: 2/12/81

By The Court

Charles H. Haden II
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

WOODROW YOKUM,

Petitioner,

vs. CIVIL ACTION NO. 79-0130-E(H)

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT ORDER

Pursuant to the Memorandum Opinion and Order entered this same day herein, the Court hereby ORDERS:

1. That Respondent's motion to dismiss the present action is GRANTED.

2. That the Clerk DISMISS the present action from the docket of this Court.

The Clerk is directed to send a certified copy of this Judgment Order to all counsel of record.

ENTER: 2/12/81

By The Court

Charles H. Haden II
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81 - 1299

WOODROW YOKUM

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Charles H. Haden II, District Judge

Argued February 1, 1982
Decided November 11, 1982

Before BRYAN, Senior Judge, WIDENER and HALL, Circuit Judges.

Richard W. Cardot for Appellant; Carmen M. Ortiz, Department of Justice (William A. Kolibash, United States Attorney, on brief) for Appellee.

PER CURIAM:

This appeal is the latest in a series of lawsuits filed by Woodrow Yokum seeking the return of personal property held by the United States Government. The

property in question was seized from Yokum's property pursuant to search warrants in 1967. Some of the property was removed from Yokum's farm and transported to storage facilities while the remainder was padlocked in a barn on Yokum's farm and may still be there today. The property consisted rimarily of motor vehicles, military equipment and other items of personal property which the government alleged had been stolen from it. In 1968, Yokum was convicted of 10 counts of an eleven count indictment for interstate transportation of stolen vehicles, 18 U.S.C. Sec. 2312, interstate transportation of stolen property, 18 U.S.C. Sec. 2314, and unlawful sale of property stolen from the government, 18 U.S.C. Sec. 641. With the exception of one count, his conviction was affirmed on appeal. Yokum v. United States, 417 F.2d 253 (4th Cir. 1969), cert. den. 397 U.S. 907 (1970).

In 1970, Yokum filed a motion for the return of the property seized in conjunction with a request for a reduction of his criminal sentence pursuant to FRCrP 41(e). That motion was denied without prejudice to Yokum's right to institute civil proceedings for the return of the property.[1]

In 1973, Yokum filed a civil suit in the United States District Court for the Northern District of West Virginia seeking the return of the property or damages. That suit was dismissed as to the United States Attorney named as a defendant on the ground of quasi-judicial immunity and as to the government itself on the ground of sovereign immunity. Yokum v. United

1. Although the district court at Yokum's criminal trial could have decided the issue raised here, a civil action is also an appropriate alternative. See United States v. Wilson, 540 F.2d 1100, 1104 (D.C.Cir.1970).

States, et al, No. 73-105-E (N.D.W.Va., September 13, 1974). Yokum did not appeal that order.

Next, Yokum filed suit in the United States Court of Claims in 1975 seeking the return of the property or damages in the alternative. The Court of Claims, mentioning only the damage claim, granted summary judgment to the government on the ground that the statute of limitations had run. The court concluded that Yokum's cause of action accrued at the time of the taking of the property, which in this case was 1967. The court then applied the six year statute of limitations applicable to actions filed in that court, 28 U.S.C. Sec. 2501, and held that Yokum's claim was barred. Yokum unsuccessfully sought a rehearing. The Supreme Court denied certiorari. Yokum v. United States, 529 F. 2d 532 (C.Cl. 1975) (table), cert. den. 429 U. S. 820 (1976). Two other suits were filed in the Court of Claims by

Yokum's family, and both were dismissed.[2]

Yokum then filed this action 1979 in the district court asking for the return of the property. The district court dismissed with prejudice on the ground that the suit was barred by res judicata, relying on Yokum v. United States, No. 2-75, 529 F.2d 532 (Ct.Cl 1975) (table). Yokum appeals, arguing that the issue of ownership of the property and its return has not previously been decided on the merits so that it was error for the district court to conclude that the action was barred by res judicata. In that regard, he contends that the Court of Claims' opinion could not be held to have decided the issue raised here since that court is without jurisdiction to grant the relief requested in this suit, return of the property, it being authorized to consider only claims for money.

Yokum is correct in his assertion that the Court of Claims may consider only

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2. Wanda Yokum v. United States, No. 606-77 (Ct.Cl.Sept., 29, 1978), Fred L. Riggleman, et al v. United States, No. 3-75 (Ct.Cl.Sept. 29, 1977).

claims for money against the United States. United States v. King, 395 U.S. 1 (1969). Even assuming, which we doubt, that he is correct in his construction of the doctrine of res judicata, that a ruling on the merits (as contrasted with some other aspect dispositive of the claim) of a precise claim is required for the doctrine to apply, there is no doubt at all that the Court of Claims decided that the statute of limitations of six years provided in 28 U.S.C. Sec 2501 had run on Yokum's claim for money damages for what he claimed was the wrongful detention of the property. That court decided that the statute began to run in 1967 when the property was seized by the government. Yokum is bound by that finding under the doctrine of res judicata, for the same issue, wrongful detention of the property, is presented here.

That aside, and assuming Yokum is not bound by the decision of the Court of Claims, an alternate reason for our decision, which cannot be avoided by the acknowledged facts in the record, is that the present suit of Yokum is barred by the

statute of limitations applying to suits against the United States in the district court. 28 U.S.C. Sec. 2401(a) provides in pertinent part, "[e]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Even if we consider that the ruling of the Court of Claims, that the statute commenced to run in 1967, is not binding, the very latest the statute of limitations can be held to have commenced to run was in 1970 when Yokum filed his motion for "return of property" in the district court in the criminal case, United States v. Yokum, No. 67-91-E (N.D.W.Va. May 29, 1970). Because the latest date the statute of limitations commenced to run was in 1970, its running expired in 1976, so this action is time barred in all events under 28 U.S.C. Sec. 2401.

To Yokum's assertion that the defense of the statute of limitations was not raised in the district court, the answer is that the government cannot be

held to have waived the defense, and we must apply it here. Finn v. United States, 123 U.S. 227 (1887); Anderegg v. United States, 171 F.2d 127 (4th Cir. 1948), cert. denied, 336 U.S. 967 (1949). Similarly, Yokum's assertion that the relief he seeks here is equitable and the statute of limitations should not apply is without merit. Suing for the return of the property is an action in the nature of replevin, a proceeding at law. Witherspoon v. Choctaw Culvert & Machinery Co., 56 F.2d 984 (8th Cir. 1932).

The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

WOODROW YOKUM,

Petitioner

v. CIVIL ACTION NO. 79-130-E(H)

UNITED STATE OF AMERICA,

Respondent.

MOTION FOR ORDER TO
DISPOSE OF PROPERTY

Now comes the United States of America by William A. Kolibash, United States Attorney for the Northern District of West Virginia, and advises the Court that on November 11, 1982, the Fourth Circuit Court of Appeals entered judgement in Case #81-1299 affirming this Court's decision to grant the Respondent United States' Motion to Dismiss with prejudice any further claim by Petitioner Yokum to property seized by the United States during the execution of search warrants in 1967, some of which is listed in detail in the Court's Memorandum Opinion and Order

entered on February 12, 1981. The united States further advises the Court that the Petitioner Yokum timely filed a petition for rehearing in the Fourth Circuit Court of Appeals which was denied on December 22, 1982. Under Rule 41 of the Federal Rules of appellate Procedure, a mandate will issue seven days after the denial of the petition for rehearing. Accordingly, all appellate action has been concluded in the case, and the case has now been returned to the jurisdiction of this District Court. Therefore, the United States moves this Court for an Order permitting the united States Marshal to dispose of the seized property which is listed in this Court's Order of February 12, 1981, in accordance with the appropriate regulations of the United States Marshal's Service. The United States submits that its Motion should be granted in view of the opinion of this court and also the affirmance of that opinion by the Fourth Circuit Court of Appeals.

The United States further submits that no hearing will be necessary on this Motion in view of the previous extensive litigation and the concluding opinion of this Court and the Fourth Circuit Court of Appeals.

/s/UNITED STATES OF AMERICA
WILLIAM A. KOLIBASH
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

WOODROW YOKUM,

Petitioner,

v. CIVIL ACTION NO. 79-130-E(H)

UNITED STATES OF AMERICA,

Respondent.

RESPONSE TO RESPONDENT'S MOTION
FOR ORDER TO DISPOSE OF PROPERTY

Comes now the petitioner by his counsel, Richard W. Cardot, and advises the Court that the Petitioner would resist the motion for Order to dispose of porperty filed herein by the Respondent. Contrary to respondents assertions all appellant action has not been conlcuded in the case. However, under Rule 41 of the Federal Rules of Appellate procedure a mandate shall automatically issue within seven (7) days and petitioner has moved the Fourth Circuit to stay the mandate. This was done on the 10th day of January, 1983, however, this was denied by the United States Court of Appeals for the

Fourth Circuit on January 12, 1983. The petitioner still desires and intends to file an appeal with the United States Supreme Court. Petitioner does not believe that time is of the essence that would require the immediate seizure of any properties since the properties have been stored there since 1967. Secondly, the petitioner would oppose the Motion for Order to dispose of property in that the decision of the Fourth Circuit did reverse Judge Hadens decision as to res judicata being the reason to terminate this litigation but instead found that the statute of limitations had run against the petitioner. Petitioner would submit and is prepared to argue that if the statute of limitations has run against petitioner it has also run against the United States of America, the respondent, on its search warrants to recover these properties. And that the properties have for in all effect been abandoned by the United States of America, the respondent. And ifthat the statute of limitations has run against plaintiff it has thus run against the respondent.

The petitioner would oppose the entry of the order by the court without any opportunity of the petitioner to be heard on his position relating to the statute of limitations having run against the respondent, United States of America.

The petitioner would submit that a hearing will be necessary on the respondents motion and the petitioners opposition thereto.

WOODROW YOKUM
By Counsel

/S/
RICHARD W. CARDOT
Attorney at Law
P. O. Drawer 1729
Elkins, WV 26241
Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

WOODROW YOKUM,

Petitioner,

v. CIVIL ACTION NO. 79-0130-E(H)

UNITED STATES OF AMERICA,

Respondent.

ORDER DIRECTING DISPOSITION OF PROPERTY

Presently pending before the Court is the Respondent's motion for order to dispose of property and the Petitioner's response opposing said motion.

The Court having maturely considered the Motion and response thereto and finding that the grounds for delay in disposition asserted by the Petitioner to be frivolous in law at this point in the litigation, and furhter believing a hearing on the matter not to be required and thus apprehending no just reason to delay the ultimate resolution of this case, therefore,

ORDERS that the United States Marshal, in accordance with appropriate

with United States Marshal Services's regulations, dispose of all property seized during the execution of federal search warrants in 1967 in the criminal prosecution of Petitioner Woodrow Yokum, said property being listed in part in this Court's previous Order of February 12, 1981. It is further

ORDERED that the United States Marshal's Office prepare and file with this Court a report of the results of the disposition of the subject property.

The Clerk is directed to mail a certified copy of this Order to counsel of record.

ENTER: February 4, 1983

By the Court

Charles H. Haden II
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1299

WOODROW YOKUM

Appellant

v.

UNITED STATES OF AMERICA

Appellee

ORDER

We have considered the petition for rehearing in this case and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

Withe the concurrences of Judge Bryan and Judge Hall.

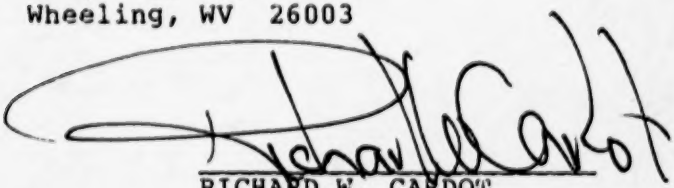
FOR THE COURT

Filed
December 22, 1982
U.S.Court of Appeals
Fourth Circuit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of February, 1983, three (3) copies of Petitioner's Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals, was served upon counsel for Respondent by depositing said true copies in the United States Mail with sufficient postage attached thereto, addressed to counsel for Respondent at the following address:

William A. Kolibash
United State Attorney
P. O. Box 591
Wheeling, WV 26003



RICHARD W. CARDOT
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P. O. Drawer 1729
Elkins, WV 26241
Counsel for Petitioner